

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 26, 2002

IN RE:

COMPLAINT OF US LEC OF TENNESSEE, INC.
AGAINST ELECTRIC POWER BOARD OF
CHATTANOOGA

DOCKET NO.
02-00562

ORDER APPOINTING HEARING OFFICER

This matter came before the Tennessee Regulatory Authority (the "Authority") at a regularly scheduled Authority Conference held on June 11, 2002 upon the *Complaint* filed by US LEC of Tennessee, Inc. (US LEC) against the Electric Power Board of Chattanooga ("EPB") on May 15, 2002. In response, EPB filed a *Motion in Opposition to Commencement of a Contested Case or Motion to Dismiss* ("Motion to Dismiss") on June 10, 2002.

The *Complaint* alleges that EPB is subsidizing its telecommunications division through use of the name "EPB Telecommunications" and the reputation and good-will associated with its electric division thereby violating the Authority's order approving EPB's application for a certificate of public convenience and necessity¹ (the "*Order*") and Tenn. Code Ann. § 7-52-402.²

¹ See *In Re: Application Of Electric Power Board Of Chattanooga For A Certificate Of Public Convenience And Necessity To Provide Intrastate Telecommunications Service*, Docket No. 97-07488, *Order Approving Application for Certificate of Public Convenience and Necessity*, (May 10, 1999).

² *Complaint* at 2. Tenn. Code Ann. § 7-52-402 (1998) provides:

A municipality providing any of the services authorized by § 7-52-401 shall not provide subsidies for such services. Notwithstanding the limitations set forth in the preceding sentence, a municipality providing such services shall be authorized to:

(1) Dedicate a reasonable portion of the electric plant to the provision of such services, the costs of which shall be allocated to such services for regulatory purposes; and

(2) Lend funds, at a rate of interest not less than the highest rate then earned by the municipality on invested electric plant funds, to acquire, construct, and provide working capital for the system, plant, and equipment necessary to provide any of the services authorized under § 7-52-401; provided, that such interest costs shall be allocated to the cost of such services for regulatory purposes. Any loan of funds made pursuant to this section shall be approved in advance by the state director of local finance and shall contain such provisions as are required by the state director.

The *Complaint* also alleges discrimination on the part of EPB in favor of its telecommunications division against third party carriers by allowing the telecommunications division access to certain rights-of-way used by, or under the control of, the electric division while denying such access to other third party carriers.³ Finally, the *Complaint* alleges that EPB has failed to provide the Authority with certain internal auditing statements required by the *Order* concerning EPB's compliance with the *Order*.⁴

In its *Motion to Dismiss*, EPB argues that EPB Telecommunications, as a part of the same legal entity as EPB, is an appropriate name for EPB's telecommunications division and is provided for by the organizational structure set forth in Tenn. Code Ann. § 7-52-401.⁵ Regarding US LEC's allegation that third party carriers have been denied access to EPB rights-of-way, EPB argues that it has not received any third party requests for access to its rights-of-way.⁶ Finally, with regard to US LEC's allegation that EPB has failed to provide certain statements from its internal auditors concerning compliance with the *Order*, EPB argues that its internal auditors have issued internal audit reports, but that EPB is not required to automatically file those reports with the Authority.⁷

Authority Rule 1220-4-8-.09(b) provides that when a complaint is filed pursuant to the anti-competitive provisions of Authority rules, the Authority "shall investigate the complaint and may convene a contested case proceeding if such complaint is found to have merit." Additionally, Authority Rule 1220-1-2-.02 provides that the Authority may commence a contested case at any time with respect to any matter within its jurisdiction.

At the June 11, 2002 Authority Conference, the Directors heard the positions of the parties and thereafter voted unanimously to appoint the Authority's General Counsel or his

³ *Complaint* at 4.

⁴ *Complaint* at 4.

⁵ *Motion to Dismiss*, 2 (June 10, 2002).

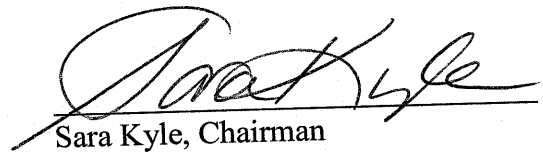
⁶ *Motion to Dismiss*, 3.

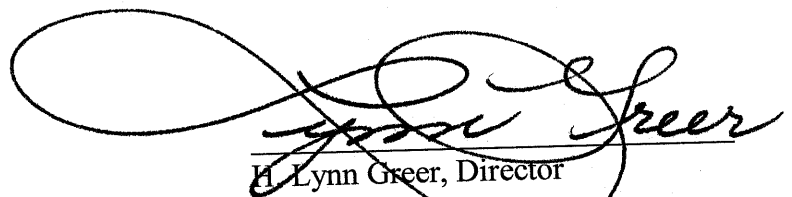
⁷ *Motion to Dismiss*, 3.

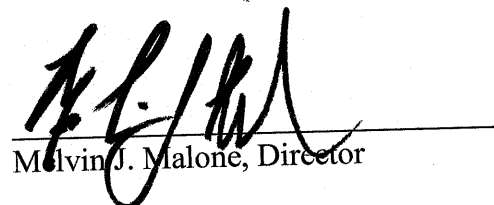
designee to act as the Hearing Officer for the purpose of resolving the *Motion to Dismiss* and, if warranted, hearing this matter on the merits. The Directors also voted unanimously to allow US LEC until 2:00 p.m., Tuesday, June 18, 2002 to file a response to the *Motion to Dismiss*.

IT IS THEREFORE ORDERED THAT:

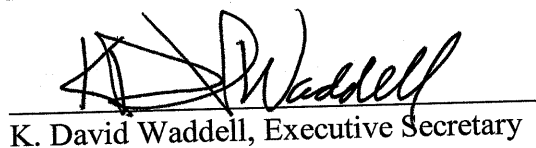
1. The General Counsel or his designee is appointed Hearing Officer in this matter for the purpose of resolving the *Motion to Dismiss* and, if warranted, hearing this matter on the merits.
2. US LEC shall have until 2:00 p.m., Tuesday, June 18, 2002 to file a response to EPB's *Motion to Dismiss*.


Sara Kyle, Chairman


H. Lynn Greer, Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary